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In The

Supreme Court of the United States

October Term, 1988

In Re:

THE BIBLE SPEAKS,

Debtor.

THE BIBLE SPEAKS, INC.,

Petitioner,

-against-

ELIZABETH DOVYDENAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Over a year after having become a "born-again Christian," respondent, a healthy, college-educated, 34-year-old heiress living at home with her husband and children, made a series of gifts to petitioner, a fundamentalist and evangelical religious community. The gifts were made over a twelve month period and totaled $6,581,356.25. When family members learned about these gifts they tricked her into visiting her parents' home where she underwent intensive professional "deprogramming." Emerging from this treatment with a deep animus against her former church, respondent sought to rescind all of her gifts alleging undue influence. A bankruptcy court judge allowed complete rescission, thereby shattering the life of petitioner's religious community.

Ultimately, the court of appeals partially reversed the judgment, including a $1 million gift made in December of 1984. But the court upheld rescission of respondent's major donation: a $5 million gift conceived of in March 1985, executed in May, and used for the very projects she determined. This gift was conceded to be religiously motivated, but the court referred to some "secular" statements by petitioner that warranted a finding of undue influence, because without them the gift "may not" have been made.

THE QUESTIONS PRESENTED ARE WHETHER petitioner's first amendment rights to teach and instruct, and to solicit and receive donations are violated

I. by the court's reliance on assertedly non-religious statements or conduct as a basis for rescission of a religiously motivated gift without an unequivocal finding that *but for* those non-religious factors the gift would not have been made?

II. by the court's retrospective characterization of statements and conduct as "secular" that, at the time they occurred, the parties involved understood to have a substantial religious dimension?

III. by the court's failure to make an independent judgment on the whole record as to whether rescission of respondent's $5 million gift impermissibly interfered with the petitioner's first amendment rights, contrary to this Court's decision in *Bose Corp. v. Consumers Union of the United States,* 466 U. S. 480 (1985)?

IV. by the court's failure to require clear and convincing proof of the existence of undue influence?*

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* **Rule 28.1 Listing.** There are no parents, subsidiaries, or affiliates of petitioner The Bible Speaks, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner The Bible Speaks, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on March 9, 1989.

OPINIONS BELOW

The opinion and order of the bankruptcy court allowing respondent's claim of $6,581,356.25 against petitioner (Appendix C pp. 84a - 134a) are unofficially reported as *In Re The Bible Speaks*, 73 B. R. 848 (Bankr. D. Mass. 1987). The memorandum opinion and order of the district court affirming that order (Appendix B pp. 48a - 83a) are officially reported as *The Bible Speaks v. Dovydenas*, 81 B.R. 750 (D. Mass. 1988). The opinion and judgment of the court of appeals affirming in part and reversing in part (Appendix A pp. 1a - 47a) is reported as *In Re The Bible Speaks*, 869 F.2d 628 (1st Cir. 1989).

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1989. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The first amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

In relevant part, the fourteenth amendment provides that:

> Section 1. ... nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition arises out of a series of gifts made by respondent during a twelve month period between December of 1984 and December of 1985. The gifts were made to petitioner The Bible Speaks, Inc., a fundamentalist and evangelical religious community centered in Lenox, Massachusetts. Respondent first became acquainted with The Bible Speaks in 1982, when she and her husband moved to Lenox. During 1983 and 1984, respondent became increasingly absorbed in the community's spiritual and social life, becoming a devout "born-again Christian." *In Re The Bible Speaks,* 869 F.2d 628, 631-32 (1st Cir. 1989); A. pp. 8a - 14a. There is no dispute that when she made her gifts, respondent was a physically healthy, intelligent, college educated, 34 year old woman who at all times lived at home with her family, took care of her children, and travelled freely.

Petitioner's gifts were as follows: (1) a $1 million gift completed in December of 1984; (2) a $5 million gift initially conceived of in March of 1985, and completed in May of 1985; (3) several small gifts totalling $80,000 made between July and November of 1985; and (4) a final $500,000 gift completed in December of 1985. 869 F.2d at 633-40; A. pp. 14a - 31a. Respondent's family finally tricked her into leaving Lenox, and then subjected her to intensive professional "anti-cult" deprogramming.[1] The end result was that the once devout and

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[1] As a result of a pretext respondent was misled into going to Minnesota 869 F. 2d at 640; A. pp. 31a - 33a. The evidence is undisputed that when she arrived, she was kept there in a specially rented house for six days

happy member of the church became an implacable enemy,[2] and respondent sought to rescind all of her gifts.

A. Procedural History

After abortive proceedings in the state court, the church sought shelter in bankruptcy. The bankruptcy judge sustained respondent's claim as a creditor, holding that all her gifts had resulted from undue influence exercised by or through the church's leader, Pastor Stevens. *In re The Bible Speaks,* 73 B. R. 848 (Bankr. D. Mass. 1987). The church appealed to the district court under 28 U. S. C. § 158 (a). That court "accept[ed] and adopt[ed] in full" the bankruptcy judge's findings of fact, and concluded that his decision was not "clearly erroneous." *The Bible Speaks v. Dovydenas,* 81 B. R. 750, 761 (D. Mass. 1988); A. pp. 48a, 83a.

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in the company of her family but without her children. For hour upon hour professional "anti-cult deprogrammers" exposed her to videos of various purported "cults" and totalist groups, including the Mormon Church, the Unification Church, the Hare Krishnas and the Rajneesh. Joint Appendix filed with the Court of Appeals, herein after "J.A.," Vol. I, pp. 571 - 72; J. A. Vol. II pp. 1223. After the six days with her family, Mrs. Dovydenas then entered a half way house called Unbound, Inc. in Iowa for yet another two to three weeks (J. A. Vol. IV, p. 2528), where she was exposed to "scripture twisting" and "miracle" debunking. J. A. Vol. VI, pp. 3320-30. Upon leaving Unbound, Inc., she returned to her parents' house in Minnesota and stayed there for another month.

2 Respondent developed intense hostile feelings against The Bible Speaks. J. A. Vol. II, p. 922. Both Dr. Gersh, a psychologist, and Dr. Varner, a psychiatrist, recognized that her "major motivation is to expose The Bible Speaks - - for what it is." *Id.* at 914; J. A. Vol. VII, p. 4296. At trial, respondent testified that she was "very angry about what people did to me" [at The Bible Speaks] (J. A. Vol. II, p. 1236) and she decried the "disgusting and humiliating treatment" that she had received. *id.* at 1290.

The court of appeals affirmed the judgment in part and reversed in part. The court held that rescission had been improperly allowed with respect to both the initial $1 million gift made in December of 1984, and the several smaller gifts totalling $80,000 made between July and November of 1985. But the court affirmed with respect to the intervening $5 million gift, and respondent's final gift of $500,000. *In Re The Bible Speaks*, 869 F. 2d 628 (1st Cir. 1989), A. pp. 1a - 47a.

Petitioner does not seek review of the finding with respect to the final gift of $500,000.[3] But with respect to the $5 million gift, petitioner submits here, as it did in the court below, that *even assuming all the findings of fact accepted by the court below were true*, rescission unconstitutionally burdens the rights of religious communities to teach their own special beliefs and to solicit, receive and use gifts.

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[3] The record would show that respondent became even more deeply immersed in the church, partly as a result of her husband's absences and alienation from her family resulting from her family's interference in her gift-giving. But in terms of this Court's jurisdiction, the final gift is far too deeply fact-bound and case-specific to present petitioner's constitutional claims in clear focus. Nor is recovery of that gift necessary for petitioner to re-establish itself as a viable religious community.

B. The Opinion of the Court of Appeals

1. The legal standards. The court of appeals stated that the standard governing appellate review was simply the "clearly erroneous" standard of F. R. Civ. Proc. 52(a), and for the court "[a]ll credibility conflicts were resolved [by the bankruptcy judge] in favor of the [respondent]." The court then said:

> Because of our decision, *infra*, that the first amendment is not implicated in this case, we do not reach TBS' argument that its first amendment claim requires that we independently review the facts.

869 F. 2d at 630; A. pp. 6a - 7a. Next, the court restated the evidence before the bankruptcy judge.[4] After giving a hornbook-like review of the Massachusetts case law, the court correctly stated that with respect to each separate gift a finding of undue influence required proof of "'submission to the overmastering effect of such unlawful conduct.'" 869 F. 2d at 641; A. p. 34a, and the court formally acknowledged that "'there must be a solid foundation of established facts upon which to rest [such] an inference'..." *Id.* at 642; A. p. 37a.

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[4] But at this point there is a striking difference: "Where there is a significant conflict between [respondent's] testimony and those testifying on behalf of TBS, we have stated defendant's testimony in detail." 869 F. 2d at 631; A. p. 8a. Fully one-half of the court's opinion is then taken up simply with stating the differing testimony.

2. The Gifts. With respect to respondent's initial $1 million gift, completed in December of 1984, the court quoted from the bankruptcy judge's findings:

> Well, when we got back in the car [on the way from Framingham to Lenox,] Carl Stevens said to me, "Betsy, it seems like you've really been hearing from the holy spirit." And when he said that, I got three thoughts in my head. One, two, three. And I said, "Yes, I really have been hearing the holy spirit." And in fact, I had my notebook out, and I turned on the little light in the backseat of his car, and I wrote down the three things that I heard in my head that I should do. And the first one was that I should get baptized. The second one was that my children should be dedicated in The Bible Speaks in a certain kind of ceremony that they do with children, and that I should give a million dollars to The Bible Speaks.

869 F. 2d at 642; A. p. 38a. At this time Barbara Baum, Pastor Stevens's soon-to-be-wife and respondent's then close friend, suffered greatly from migraines. Respondent testified that she believed that her financial gifts could help cure those headaches. 869 F. 2d at 633; A. p. 15a. Of this gift, the court of appeals said:

> There is no evidence that making the gift was suggested by anyone at TBS or that anyone at TBS told [respondent] that she should give the money in order to cure Baum's

> headaches. That notion also originated with [respondent] . . . .
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> XXXX
>
> Here, [respondent] received advice from both Jonas and Okabena [her husband and her financial advisors] and she chose to ignore the advice. [Respondent] was in her thirties, in good health, and a college graduate . . . .

869 F. 2d at 643; A. pp. 38a - 39a.

But the court then went on to sustain rescission of the $5 million gift, a gift conceived of only 90 days later, and executed only six months after the $1 million gift. Yet during this entire period, respondent was still "in her thirties, in good health, and a college graduate" - - and still living at home, taking care of her children, travelling widely, and obtaining advice from her financial advisors. Moreover, the notion to give this gift also originated with respondent. As the court of appeals acknowledged, respondent testified that in March she told Pastor Stevens that she "had heard God tell her to give $ 5,000,000 to [petitioner] in June." 869 F. 2d at 634; A. p. 17a.

The court of appeals referred to four factors that, it said, determined "respondent's decision to make [the gift] earlier than had been planned." 869 F. 2d 643; A. p. 40a. *First*, Pastor Stevens, Baum, and another member of the church had "deliberate[ly] fostered respondent's belief that her initial $1 million gift had cured Baum's headaches." The headaches had not been cured. *Second*, "Pastor Stevens's influencing respondent not to tell her husband or family about the gift . . . because Stevens had told her that her family was evil and not to be

trusted." *Third*, the church's "deliberate misrepresentation" to respondent in April that a missionary, Pastor Turkia, was being held in Rumania "at great danger" to his life, even though Pastor Stevens knew then that Turkia's release had already occurred. Respondent's testimony was that she *accelerated* her already planned gift of $5 million because of her belief that it could help effectuate Turkia's release. *Fourth*, and finally, the court pointed to Pastor Stevens having prevailed upon respondent to write that God had prompted her gift and that no one had asked her to make or knew about the gift. The first two statements were true, but "[t]his last part was false. Stevens and Baum knew about the gift . . . and accelerated its delivery." 869 F.2d 643, 644; A. pp. 40a - 41a.

The court then addressed the significance of these four factors:

> These facts lead inexorably to a finding of undue influence. If plaintiff had been told that Baum's headaches had not been cured by her first gift of $1,000,000, *she may not have made the second gift* at all. If she had not been influenced to keep the gift a secret from husband and family, *she may not have gone through with it*. If she had been told that Turkia was in no danger, *she probably would not have accelerated the gift*. And the letter composed by Stevens, dictated by Hill and written by plaintiff is damning evidence that Stevens and Hill knew they were engaging in improper conduct.

869 F. 2d at 644; A. pp. 41a - 42a (italics supplied).

The court set aside the rescission of four small gifts totaling $80,000 made between July and November of 1985, shortly after the $5 million gift. Presumably, respondent had the same fundamental attributes of health, intelligence, etc. Presumably, too, she still believed in her capacity to work miracles by her gifts, and that her gift had cured Baum's headaches and had secured Turkia's release, etc. Yet the bankruptcy judge's findings were overturned for failure of proof.[5] 869 F. 2d at 644; A. p. 43a.

C. The First Amendment. At the close of its opinion, the court brushed aside the first amendment claims of the church. (pp. 47 - 50) The first amendment provides no protection for "purely secular statement of facts . . . merely because they are made by officials of a religious organization." 869 F. 2d at 645; A. p. 44a. The court added:

> Neither our decision in this case nor the proceedings below implicates the religious tenets of TBS or the beliefs of its adherents. The findings and rulings rest solely on secular statements and actions . . . . There has been no inquiry as to whether Stevens and the other TBS adherents were acting in accord with

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5 Indeed, it is only with respect to a single gift, the $5 million gift, that the evidence was deemed sufficient to show that respondent's will was overcome during this entire period until respondent made her final gift of $500,000 at the end of 1985. With respect to that gift, the court concluded that the church "had pervasive control over [respondent's] business and legal affairs," and respondent was "isolated" from her non-church friends. 869 F.2d at 644; A. p. 42a. But see p. 6, n. 3, *supra*. These factors were *not* present at the time of the $5 million gift.

> what they perceived to be the commands of their faith . . .

869 F. 2d at 645; A. pp. 45a - 46a.

Finally, the court dismissed petitioner's claim that, even assuming all credibility findings in respondent's favor, the record made plain that respondent's gifts were in substantial measure the product of respondent's own authentic religious convictions. "[A]s already discussed," the court said, the first amendment does not preclude a determination "whether the secular reasons for making and accelerating the gifts was [sic] the result of undue influence." "Second, the [respondent] has not claimed the protection of the first amendment. TBS may raise only its free exercise claims, not those of the [respondent]." 869 F. 2d at 646; A. p. 46a.

REASONS FOR GRANTING THE WRIT

This petition raises issues of concern to all religious groups, as the *amicii* supporting this petition will show. But they are of especially grave concern to evangelical and fundamentalist religious communities. Their non-mainstream character renders them particularly vulnerable to bias and misunderstanding, both conscious and unconscious, in tort and restitution suits brought by apostate members, particularly former members who have undergone extensive professional deprogramming.[6] *See also Molko & Leal v. Holy Spirit*

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[6] There are over 1200 different religious bodies in the United States and they are marked by a wide diversity in beliefs and practices. *See* Note, *Developments In The Law - - Religion and the State*, 100 Harv. L. Rev. 1606, 1613 - 19 (1987).

Association for the Unification of World Christianity, 46 Cal. 3d 1092 (1988), 762 P. 3d 46, *cert. den.* No. 88 - 1600 (May 22, 1989) (ordering trial on undue influence claim for restitution). And this case illustrates the great damage that such rescission suits can cause to these religious communities. Respondent's $5 million gift was used for the very purposes she prescribed: the construction of a new chapel, a swimming pool for children, and other improvements at The Bible Speaks campus. Petitioner could not restore the gift, and its real estate was sold - - to respondent. The rescission judgment atomized and shattered a once vibrant religious community.[7]

This petition presents an appropriate occasion for this Court's much needed guidance. This Court has not dealt with issues arising out of assertedly improper religious teachings and solicitation since *United States v. Ballard*, 322 U. S. 78 (1944), and the Court has never addressed the questions presented in this petition. The questions presented are not fact-bound and case-specific. They arise even if every pure credibility finding is assumed against petitioner.

This Court should take this petition as an occasion to state that rescission of religiously motivated gifts by apostate members for undue influence is constitutionally impermissible unless there is a finding that *but for* the "non-religious" factors alleged to constitute undue influence, the gifts would not have been made. Moreover, rescission cannot rest on the basis of any assertedly "secular" factor if, at the time of the events, the

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[7] In 1987, The Bible Speaks had 1,300 members, a large campus housing a school for children K - 12, as well as the Stevens Bible School, a radio and television ministry, and about 100 affiliated churches throughout the world. 896 F. 2d at 631; A. pp. 9a - 10a.

parties themselves understood that factor to possess a substantial religious dimension. In addition, undue influence must be determined by the court after exercising its own independent judgment based on the whole record. And finally, proof must satisfy the clear and convincing evidence standard. Acceptance of any one of these four propositions will result in reversal of the court of appeals.

A. State Law Cannot Impermissibly Burden the Right of Religious Communities to Teach Beliefs and Instruct and to Solicit, Retain and Use Voluntary Gifts.

The court of appeals' abrupt treatment of the petitioner's first amendment claims shows the imperative need for guidance from this Court. The court repeatedly acknowledged the religious origin and motivation of respondent's $5 million gift. 869 F. 2d at 634, 643, 645 - 46; A. pp. 15a, 17a, 45a - 46a. But the court said that in relying on these factors, the church improperly attempted to raise respondent's, rather than its own, rights. (p. 46a, *supra.*) This assertion is mystifying. Petitioner surely has a right to teach its religious beliefs to its adherents that is guaranteed by the first amendment. *E.g. Cantwell v. Connecticut*, 310 U. S. 296 (1940). The same is true of petitioner's rights to solicit, receive, and use religious contributions.[8] *Id.* at 306. Those rights do not originate in

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[8] Solicitation of funds by religious communities has long been understood to fall within the core protection accorded by the first amendment. *Cantwell v. Connecticut, supra,* at 306. "It is plain that a religious organization needs funds to remain a going concern." *Murdoch v. Pennsylvania,* 319 U. S. 105, 111 (1943); *Larson v. Valente,* 456 U. S. 228 (1982). Solicitation of funds by any charitable corporation for any legitimate purpose is activity protected by the constitution of the United

state law (although, of course, state law may also independently protect them), but in the first amendment. What a donor lawfully contributes in response to the church's teaching, the church has a corresponding, reciprocal right to receive, keep, and use for church purposes. In asserting the right to be free from being penalized for religious teachings, and the right to keep the donations it has received because of the donor's religious convictions, the church asserts its own rights, not those of a third party. *Cantwell, supra; Murdoch, supra; Larson, supra.*[9]

State law cannot impermissibly burden petitioner's rights to solicit and keep donations, any more than it can impermissibly burden any form of religious liberty or other fundamental right. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe upon the protected freedom," this Court said of the right of religious solicitation in *Cantwell v. Connecticut, supra,* at 304. Even assuming therefore that state law may properly prohibit solicitation by fraud or undue influence, and permit rescission of gifts made in such circumstances, the state law cannot define these concepts so as to undermine the church's fundamental rights to teach and instruct, and to receive donations. Thus, in *United States v. Ballard*, 322 U.S. 78, 86 - 88

States. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U. S. 788, 797 - 98 (1985); *Heffron v. Int'l Soc. for Krishna Consc. (ISKCON)*, 452 U. S. 640, 647 (1981).

9 *See also* the cases cited in note 6, and Hart and Wechsler's *The Federal Courts and the Federal System* 174 (3rd ed., 1988) (P. Bator, *et al.*, eds.). Moreover, a solicitor of funds has standing to assert the donor's rights to resist state regulations. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U. S. 947, 954 - 58 (1984).

(1944), this Court held that in a fraud action the truth of religious beliefs is not a valid subject of judicial inquiry, although the truth of claims asserted on behalf of commercial products is surely a valid subject of such an inquiry.[10]

The need for *some* constitutionally fashioned protection for religious communities is particularly clear here, where the state law relied upon to permit rescission is not fraud but undue influence. The highly anomalous character of a fraud claim based on "wrongly induced" religious beliefs is evident enough. But when compared with undue influence, a fraud action is the very model of a carefully structured cause of action: at a minimum, in a fraud action the plaintiff must prove reliance upon *specific* and *material* representations, etc. That is, plaintiff must show that the gift would not have occurred but for reliance upon one or more specific, material misrepresentations. Undue influence actions present a far graver threat. Surely no argument is needed to establish that a religious conversion produces an "influence" that fundamentally changes the converted. What, then, is "undue"? This respondent was a "born-again-Christian," a believer thoroughly saturated with church and teachings as a result of reading church pamphlets, attending Bible classes and listening to sermons and

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[10] *See also Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 108 S. Ct. 1319, 1325 (1988). *Ballard* is simply one in a long familiar line of decisions in which this Court has constrained otherwise acceptable state law concepts of fraud, obscenity, libel, etc., in order to prevent impairment of underlying first amendment values. *E.g., New York Times v. Sullivan*, 376 U. S. 254 (1964) (libel); *Miller v. California*, 413 U. S. 15 (1973) (obscenity); for a recent example, *see Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (restricting state tort law of intentional emotional injury). *See also Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F. 2d 875, 879 - 883 (9th Cir. 1987) (employing same approach in religious context.)

tapes of church leaders, and interacting with fellow believers in a large and vibrant religious community (p. 13, n. 7). To ask whether such a recently converted donor's will was "overcome" by *some* "impermissible" conduct and "fraudulent" statements invites completely unfocused fact-finding (on the premise that "everything is relevant") and wholly subjective and unstructured judgments on the significance of the facts found.[11] To permit rescission of gifts used for the very purposes designated by the donor on the basis of such after-the-fact, ill-defined judicial inquiries threatens the rights of all religious communities to preach, teach doctrine and to receive donations.[12]

1. But for Causation is Required. Quite plainly, the effect of the court's ruling renders religious communities perpetually hostage to suits by apostate donors who become sufficiently dissatisfied with their former religion, or, more likely, their former religious leaders. The ultimate consequences for the church can be disastrous, as this case illustrates. If the first amendment right of religious communities, particularly non-mainstream ones, are not to be eviscerated by undue influence suits brought by apostate donors this Court must require adequate findings on causation. No rescission can be authorized on the basis of religious factors. More importantly here,

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[11] This Court has long recognized the dangers created by such open-ended inquiries to the interests protected by the free speech and religion clauses. *E. g., Cantwell v. Connecticut, supra,* 310 U. S. at 307 - 308; *Houston v. Hill,* 482 U. S. 451, 465 n. 15 (1987) (collecting cases); *Hustler Magazine v. Falwell, supra.*

[12] These dangers are magnified when the undue influence does not come from physical isolation or dependence but simply from statements allegedly made during conversations at which only the donor and one or more church members are present, and the donor is a witness who has been subjected to an intensive "faith-breaking" process.

rescission of religiously motivated gifts because of alleged non-religious factors is impermissible unless the donor can establish that *but for* the impermissible non-religious conduct the gift would not have been made.[13]

The court's opinion makes clear the need for that minimal constitutional protection. Respondent's $5 million gift was conceived of less than 90 days after her initial $1 million gift. Like the first gift, the second gift was concededly religious in origin and motivation. *Many of the same conditions obtained:* at both times, respondent was a physically healthy, college educated, completely devout "born-again Christian" living at home with her family. The court points to four intervening factors that "lead inexorably" to undue influence. Yet after stating these factors, the court concludes with nothing more than a series of speculative assertions: because of these factors respondent -- a devout "born-again Christian" absorbed in the church's communal life -- "may not have made the second gift," or "probably would not have accelerated the gift." There is not the slightest discussion of what the court believed to be the relationship between these "secular" factors and the complex web of other -- and unchallenged -- authentic religious convictions that led respondent to make this gift. There is no finding that but for these *additional* non-religious or "secular" factors respondent would not have made her religion-driven gift.[14] Nor could there be -- given the conceded intensity of her

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[13] Petitioner has not argued that unless the donor is physically isolated and dependent religious donations are absolutely protected, although there is much to be said for that view.

[14] This proof would be required in any fraud case, and, the court of appeals opinion is little more than a fraud opinion. Virtually every factor relied upon by the court involves alleged deception. *See Kungys v. United*

religious convictions that had been formed as a result of her deep immersion in The Bible Speaks during 1983 and 1984.

2. The Court Below Erred In Using A Secular/Religious Distinction. The need for this Court's direction is further apparent when one examines the assertedly "secular" factors that the court did rely upon in connection with the $5 million gift.[15] It would, of course, offend the first amendment to consider religious factors as a basis for rescission. Yet virtually every "secular" factor mentioned by the court was understood by the parties to have a significant religious dimension. This is especially evident with respect to the findings that Pastor Stevens told respondent that she "should not tell her husband or family about the [proposed] gift . . . because her family was evil and not to be trusted." (869 Fed. at 644, A. p. 41a, *supra*.) Suggestions of that nature had close links to church teachings reflecting a pervasive distrust of outsiders,[16]

States, 108 S. Ct. 1537, 1548 (1988) (misrepresentation must be material to justify denaturalization).

[15] In the court below, respondent's counsel sought to label a wide range of Pastor Stevens's conduct as "secular." ***Virtually all of this conduct occurred after the $5 million gift;*** accordingly, the court of appeals properly did not rely upon the subsequent conduct in considering the validity of the $5 million gift. ***Woodbury v. Woodbury***, 141 Mass. 329, 333, 5 N. E. 275, 280 (1886). ("Undue influence must be exercised in relation to the gift made, and not as to other transactions, in order to invalidate a gift thus attained.")

[16] The uncontradicted evidence showed what common sense alone makes clear: a byproduct of becoming a "born-again Christian" may well have a religion-rooted disruptive influence on a family and friends. But the fact that the conversion may bring such a result is recognized in the Bible itself (*e.g.*, Matthew 10:34-38), and this doctrine has a firm place in Christian theory and in the teachings of The Bible Speaks. Similarly, the uncontradicted evidence showed the church's belief that "outsiders" must

and moreover, they would help overcome the strong opposition of respondent's husband and family to her religiously motivated desire and right to give to the church, and the church's constitutionally protected desire and right to receive her gift.[17]

This Court has recently recalled the difficulty of distinguishing between secular and religious motivation. *E.g., Frazee v. Illinois Dept. of Employment Security,* 109 S. Ct. 1514, 1517 (1989). That effort may be unavoidable where, for example, independent governmental interests are at stake. *Frazee, supra.* But, as between the church and its adherents, no justification exists for judges retrospectively impressing on past events a mode of understanding that was wholly foreign to the participants' own understanding. *Lyng v. Northwest Indian Cemetery Ass'n.*, 108 S. Ct. 1319, 1319 - 20 (1988). The experience at issue "must be defined from the believer's perspective." L. Tribe, *American Constitutional Law* § 14.6 at 1181. From the point of view of both petitioner and respondent her gift was religiously motivated, and the few "secular

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be viewed with suspicion, and, more importantly, that believers must reject "evil reports," particularly those reports critical of pastors and church leaders. Pastor Stevens's book, *The Progression of Conspiracy,* J. A. Vol. X, p. 5811, insists upon the existence of a Satan-inspired conspiracy directed principally against "pastor-teachers" and he instructs the faithful not to entertain false reports against their pastors.

17 Pastor Stevens's request that respondent write the letter that falsely indicated that the church was unaware of the proposed gift did no more than assist respondent in accordance with his (and her) sincere *religious* desire that she should contribute a portion of her wealth to the church, a desire then impeded by the obstacles interposed by her family - - above all her husband, who had bitterly opposed her initial $1 million gift. Indeed, the bankruptcy judge found that Stevens told respondent that [her financial adviser's] divulging of her plans to her father "was an example of the Devil seeking to frustrate God's work. She accepted this characterization. . . ." (J. A. Vol 1, p. 107).

statements of fact" referred to by the court were themselves religious, or at a minimum, possessed a significant religious dimension.[18]

Moreover, in practical terms, the court's "secular" approach in this case is tantamount to licensing a direct inquiry into both the truth and the sincerity of the petitioner's religious beliefs. All religions posit some physical manifestations of belief -- for example, an immaculate conception, a resurrection, miraculous cures, the finding of a sacred book, etc. Are these physical events to be understood as "secular" in nature, open to examination as to their truth or sincerity? This Court has categorically barred inquiries into the truth of religious beliefs. *United States v. Ballard, supra.* This Court has emphasized the dangers to religious liberty in intrusive inquiries into the sincerity of religious beliefs. *Gillette v. United States*, 401 U.S. 437, 455 - 57 (1974).[19] This Court has recognized that extensive inquiry into religious doctrine by a civil court is impermissible. *Serbian Orthodox Diocese v. Milevojevech*, 424 U. S. 696, 709

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[18] At least since *Cantwell v. Connecticut*, 310 U. S. 296, 303 - 304 (1940), this Court has recognized that "religiously motivated conduct" is entitled to significant constitutional protection. *See Goldman v. Weinberger*, 475 U. S. 503, 506 (1986). Similar principles apply with respect to speech. *Riley v. National Federation of the Blind of N. C.*, 108 S. Ct. 1006, at 2667; *City of Lakewood v. Plain Dealer Pub. Co.*, 108 S.Ct. 2138, 2145 (1988) (constitutional protection for "conduct commonly associated with expression").

[19] This danger is particularly threatening to non-mainstream religious communities because the "questioning of sincerity may operate invisibly and subconsciously against unknown or unpopular religions." Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 954 (1989).

Serbian Orthodox Diocese v. Milevojevech, 424 U. S. 696, 709 (1976). And finally, this Court has recognized the uncertainties inherent in any use of a secular/religious distinction. *Frazee, supra.* These decisions reflect the necessity for "breathing space" if religious liberty is to have meaning. The court of appeals' facile application of a "secular/religious" distinction threatens to eviscerate that liberty. No countervailing governmental or third party interest justifies the court's undertaking: here, as in *Ballard* and *Serbian Orthodox Church, supra,* the interests of the parties alone is at issue.[20] Religious conviction suffused the respondent's gift giving, and inquiry into the "sincerity" of all - - or here - - aspects of Pastor Stevens's teachings and beliefs threatens non-mainstream religious communities with bias in fact finding. And surely, even assuming that religious solicitation is partially unprotected to the extent of the solicitor's insincere statements and acts, this fact cannot be deemed controlling unless *but for* causation is established. That minimal protection is necessary to protect religious liberty, if it is not to fall victim to crude labelling and distorted fact finding.

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[20] Justice Jackson's well known *Ballard* dissent would have barred courts from inquiring whether "less than full belief in a credo became actionable fraud if one is soliciting gifts or legacies." *United States v. Ballard, supra,* 332 U. S. at 95. *Ballard* itself, *id.* at 85 - 86, left this issue open.

> "Justice Jackson's argument's against even a judicial inquiry are most convincing when government seeks to protect gullible citizens from fraudulent religious claims, since protection from the 'wrong' of mental and spiritual poison is precisely what the Constitution put beyond the prosecution's reach."

L. Tribe, *American Constitutional Law*, § 14 - 12, p. 1245 (1987).

B. The Constitution Requires the Court to Make an Independent Judgment on the Whole Record and Clear and Convincing Evidence that Religiously Motivated Gifts Are the Result of Undue Influence.

1. Independent Judgment is Required. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof...." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U. S. 485, 510 - 11 (1984). *Bose* is only the most salient modern illustration of the underlying constitutional imperative of searching judicial review where constitutional values are implicated. *See also Miller v. Fenton*, 474 U. S. 104, 112 - 18 (1985) (coerced confession). Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985), particularly at 254 - 59. Thus, every circuit that has faced the issue in the free exercise context has held or implied that the *Bose* principle is fully applicable.[21] Yet both the district court and the court of appeals concluded that they were under no duty to apply the independent judgment rule. The court of appeals laconically remarked:

> Because of our decision, *infra*, that the first amendment is not implicated in this case, we do not reach TBS'

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21 *Friedman v. Board of County Comm'rs*, 781 F. 2d 777, 779 - 80 n.2 (10th Cir. 1985) (suggesting that after *Bose*, independent judgment rule governs review of establishment clause claims); *Presbyterian & Reformed Publishing Co. v. Commissioner of Internal Revenue*, 743 F. 2d 148, 158 n. 9 (3d Cir. 1984) (*Bose* requires *de novo* review in free exercise case); *Bender v. Williamsport Area School Dist.*, 741 F. 2d 538, 542 n. 3 (3d Cir. 1984) (same), vacated on other grounds, 475 U. S. 534 (1986).

> argument that its first amendment claim requires that we independently review the facts.

869 F. 2d at 630; A. p. 8a. This reasoning involves a plain non-sequitur. Surely it is beyond dispute that the church's constitutionally protected rights to teach and instruct and to solicit and receive gifts means that absent undue influence - - however defined - - gifts cannot be rescinded. Even assuming all evidentiary conflicts are resolved against petitioner, both the district court and the court of appeals should have independently reviewed the whole record and then applied the controlling legal standards to determine whether the bankruptcy judge's ultimate conclusion of undue influence contravened the religious liberty of the church.[22]

Imposition of an independent judgment requirement is particularly appropriate both because of the ill-defined nature of claims of psychological coercion[23] and because the scope of the constitutional right of the church to teach and to receive gifts is

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[22] In the court below, respondent argued that this case involved nothing more than respondent's "credibility." This is plainly wrong. The crucial issue is what is the judicial duty even assuming every credibility finding in respondent's favor. This case presents conventional issues of historical fact - - generally issues that respond to questions of who, what, when, why, and where - - and it presents questions concerning the legal significance of those historical facts. The latter kind of question is not reducible to the former. *Miller v. Fenton*, 474 U. S. 104, 112 - 118 (1985). *See also Maine v. Taylor*, 477 U. S. 131, at 145 - 146 n. 17 (1986). *See generally* Monaghan, *Constitutional Fact Review*, *supra*, (collecting sources discussing this issue).

[23] *See* Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1442 - 1450 (1989) (claims of psychological coercion inevitably have a heavy normative component).

affected by respondent's state of mind.[24] But this case makes clear an additional need that justifies such review. The case against the church hinged entirely on the testimony of a witness who, as a result of extensive deprogramming, became its implacable enemy (pp. 4 - 5, n. 1 and 2). Yet, for the bankruptcy judge, this case was "unsurpassed in our jurisprudence" in revealing "an astonishing saga of clerical deceit, avarice, and subjugation on the part of the Church's founder, Carl H. Stevens." *Id.* 73 B. R. at 849; A. pp. 85a. His opinion proceeding to find *every* conceivable fact, large or small, against the church. Independent review is a necessary safeguard against the risk of distorted, "Good v. Evil" fact finding.[25] The court of appeals' summary statement of the conflicts in the testimony (p. 7, n. 4) does not remotely discharge its duty under *Bose* to render its own dependent judgment on the facts.

2. Clear and Convincing Proof is Required. Much of the foregoing reasoning also mandates an additional procedural safeguard: the basis for rescission must be established by "clear and convincing evidence." That the constitution mandates special burdens of proof in constitutionally sensitive contexts is now thoroughly established. And this evidentiary

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[24] The "actual malice" rule of the libel cases is the best known example; another is *Miller v. Fenton*'s holding that "voluntariness" of a confession presents an issue of law-application that requires a court's independent judgment on the whole record.

[25] *See*, for example, *Miller v. Fenton*, *supra*, 474 U. S. at 114 (independent judgment justified when there is a predictable danger of distorted fact finding); Lupu, *supra*, 102 Harv. L. Rev. at 955 (searching appellate review will help ameliorate the very danger of unconsciously biased fact finding in litigation involving non-mainstream religious communities).

requirement of clear and convincing proof has been especially insisted upon where the scope of the constitutional privilege turns on the actor's state of mind.[26] Moreover, imposition of such a requirement here fully comports with the plurality's recent analysis of the standard in *Price Waterhouse v. Hopkins*, 109 S. Ct. ___, ___ (1989), 57 U.S.L.W. 4469, at 4476 (May 2, 1989). More than money damages is at stake in this case. The gifts were used for the very purposes specified by this donor and the church could not restore them. The effect of the rescission judgment was to shatter an on-going religious community. The church here seeks only to defend itself against such consequences, not to enforce future promised gifts.

The danger to non-mainstream religious communities from distorted fact finding will not be eliminated by a requirement of clear and convincing evidence. But those difficulties will be ameliorated. Indeed, this case presents an excellent illustration of the practical efficacy of such an evidentiary safeguard. No argument is needed to show that the court of appeals' conclusion that respondent "may not" have made her gift does not remotely satisfy such an evidentiary standard.

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[26] *See*, for example, *Bose Corp., supra*, at 511 (actual malice); *Kungys v. United States*, 108 S. Ct. 1537, 1547 (1988) (misrepresentation relevant to naturalization). This principle has been given application in the religious context, as elsewhere. *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363, 242 Cal. Rptr. 823 (1988).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

s/_____

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